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No. 989

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In the Supreme Court of the United States

OCTOBER TERM, 1967

KENNETH DALE RAHRIG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

FRED M. VINSON, JR.,
Assistant Attorney General,

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Washington, D. C. 20530.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the United States District Court for the Western District of Michigan on two counts charging the unlawful possession of a still, in violation of 26 U.S.C. 5601(a)(1), and the fermentation of mash, in violation of 26 U.S.C. 5601 (a)(7). On March 20, 1967, he was sentenced on the possession count to 90 days imprisonment at the Muskegon County Jail, with permission to leave every work day between the hours of 6:00 a.m. to 4:00

p.m.; he was placed on probation for three years on the other count (R. 13-13A). On October 7, 1967, his appeal was dismissed by the court below for failure to file briefs within the prescribed time (Pet. App. I.5-6). A "Motion for Reconsideration" was denied on October 20, 1967 (Pet. App. I.6). His petition for a writ of certiorari was not filed until January 5, 1968, and is, thus, long out of time under Rule 22(2) of the Rules of this Court. There is in any event no occasion for further review.

Petitioner's notice of appeal was filed by the Clerk on March 23, 1967 (R. 15). Thereafter, petitioner filed a motion in the district court for appointment of counsel [1] and for a transcript of the proceedings (R. 17). On March 29, 1967, the district court granted petitioner's motion to appeal in forma pauperis, but told him that application for appointment of counsel should be made in the court of appeals (R. 18, 19). The appeal was docketed in the court of appeals on June 21, 1967. On that same date, the Clerk of the court of appeals advised petitioner that if he desired appointment of counsel, a motion for appointment should be filed with the Clerk.[2] No such motion was made for three months. When petitioner was told that the government moved to dismiss the appeal, petitioner replied that he had been unaware of the fact that he had to apply in the court of appeals for appointment of counsel (R. 28, 29). He then requested

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[1] Petitioner was represented by retained counsel at trial.

[2] We are lodging a copy of the letter to petitioner with the Clerk of this Court.

a further continuance. Two weeks then passed without any motion being filed by petitioner. Only then did the court below dismiss the appeal.

In the circumstances, the court below reasonably concluded that petitioner, who has served no part of his sentence, "attempted to continue this appeal for the purpose of delay only" (Pet. App. I.6) and properly dismissed the appeal. Petitioner completely ignored the clear and precise instruction from the Clerk regarding the filing of a motion for appointment of counsel. Even when told on September 25 that the government had moved for dismissal of the appeal, petitioner took no action to comply with the instructions of the Clerk.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

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